

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 555 of 1983

with

FIRST APPEAL No 1096 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE M.C.PATELsd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?  
1to 5 No

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DEVIBEN JAYANTILAL TALATI

Versus

ROMESHCHANDRA RAMNIKLAL TALATI

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Appearance:

1. First Appeal No. 555 of 1983  
MR HM PARIKH for Appellant.  
MR RS SANJANWALA for Respondent No. 1
2. First AppealNo 1096 of 1983  
MR HM PARIKH for Appellant.  
MR RS SANJANWALA for Respondent No. 1

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CORAM : MR.JUSTICE M.C.PATEL

Date of decision: 17/02/99

## C.A.V. JUDGEMENT

1. These two appeals are filed by the original plaintiff against the common judgment, order and decree dated 31.1.1983 passed by the learned Judge, City Civil Court No.6, Ahmedabad, in Civil Suit No.3941 of 1975 and Civil Suit No.1825 of 1979, which were consolidated and tried together since the parties were common and the issues were inter-related.

2. Plaintiff Deviben Jayantilal Talati in the said suits challenged the legality and validity of a lease deed executed by her grandfather in favour of his brother in 1941 and an adoption made in 1945. She also claimed that two other properties (referred to as items B and C of suit properties) which had been acquired by and had stood in the name of one brother since 1935 and 1936 were not his exclusive properties, but were joint family properties. The plaintiff was unsuccessful in her challenge in the trial Court and her suits were dismissed. She is therefore in appeal against the said judgment and decree of the trial Court.

3. The facts leading to the present litigation are as follows:

3.1 One Narottamdas Bhogilal Talati was the common ancestor of the parties. He had two sons, Ambalal and Gokaldas and a daughter, Jamnaben. Ambalal had two sons, Jayantilal and Ratilal and a daughter, Vijayaben. Gokaldas had one son by name Ramniklal and Jayaben was the wife of Ramniklal. Jayantilal had four sons and five daughters, the plaintiff Deviben being the youngest daughter. Ratilal had three sons and one daughter. The eldest son Romesh was subsequently adopted by Jayaben after the death of her husband Ramniklal and he was the main contesting defendant.

3.2 Narottamdas, who belonged to Khadaita Bania community, was a resident of Nadiad, District Kheda. He died on 12.10.1927 leaving three immoveable properties and some moveable properties. Before his death he had made a will on 2.8.1919. In the said will, there was a reference to the will made by his father on 9.5.1912 and there was a recital that after his father's death, he and his brother Motilal had got the properties. Out of the three immoveable properties which he got, two were situated in the City of Nadiad, one was his residential house and the other was a shop. The third property was an agricultural field admeasuring 5 acres and 19 gunthas

and he had one-half undivided share. Narottamdas by his will bequeathed the northern portion of the house to Ambalal and southern portion to Gokaldas. The shop was given to Ambalal and his one-half undivided interest in the field was bequeathed to Gokaldas.

3.3 Ambalal and Gokaldas jointly purchased an open piece of agricultural land by a registered sale deed. The said land was part of survey Nos.86 and 87 and admeasured 4 acres and 4 gunthas. It was situated in the sim of Khokhra Mehmedabad, which is now part of the City of Ahmedabad. On 3.4.1941, Ambalal executed a registered lease deed in respect to the said land, giving his one-half undivided share in the said land on lease to his brother Gokaldas for a period of 999 years on a yearly rent of Rs.1611/- commencing from 1.1.1941. Gokaldas was permitted to construct houses, bungaloes, rooms, factories etc. over the same and in case of acquisition of the suit land or a part of it, it was provided that half the compensation amount of the land should be given to Ambalal and the compensation of the structure should be taken by Gokaldas and the rent amount should be proportionately reduced to the extent of acquired portion. Gokaldas was also authorised to sell, mortgage, gift or assign in any other manner his leasehold right in the said land to any one on the terms and conditions mentioned in the lease deed. It is this lease deed which is the subject of main challenge in the present litigation. The plaintiff's case is that the land was joint family property and Ambalal's alienation of his share in the land by way of lease-deed was without legal necessity and not binding on his heirs. The said land is referred to as the suit land.

3.4 Gokaldas also purchased in his own name two plots of land by registered sale deeds dated 1.2.1936 and 27.11.1935. They were subplots Nos.17 and 26 admeasuring 756 and 955 sq. yards in Desai Housing Society, situated at Maninagar in Ahmedabad. Gokaldas also constructed buildings over them which are the subject matter of the suit described at item No.B of the suit properties. Gokaldas also purchased another piece of land in Bombay on instalments from Deputy Commissioner, Improvement, Bombay Municipality on 16.8.1938 for Rs.7000/- and constructed a house over it in 1939 and it is known as "Boring House". It is the subject-matter of the suit described at Item No.C of the suit properties. The plaintiff's case is that these properties are joint family properties and she had an interest in them as an heir of the branch of Ambalal.

3.5 Ramniklal, the son of Gokaldas, died on 12.12.1946. Soon after his death, his widow Jayaben adopted Romnesh, who was the son of Ratilal as a son to her deceased husband. The plaintiff has challenged the legality and validity of the said adoption made on 11.1.1945 in Civil Suit No.1825 of 1979. The plaintiff's father Jayantilal made a will on 29.6.1959 and he died on 5.3.1960. Gokaldas also made his last will on 7.4.1958 in which after referring to the fact that Romesh, the defendant No.1 had been adopted by his daughter-in-law Jayaben after the death of his son Ramniklal, bequeathed the suit properties to him. He also made it clear that he bequeathed all the properties to defendant No.1 even in case his adoption was challenged and set aside. Gokaldas died on 14.10.1958.

3.6 In 1975, defendant No.1 who had inherited the properties of his grandfather Gokaldas under his will entered into negotiations with defendant No.2 for sale of part of the suit land and the public notice was given in a newspaper for obtaining title clearance certificate. In response to the notice, Sumitraben, the wife of Jayantilal and mother of the plaintiff Deviben, sent telegram on 10.5.1975 through her Advocate claiming that the land was joint property and the defendant No.1 had no right to sell it. There was further notice correspondence between the parties. Thereafter, Sumitraben filed Civil Suit No.3408 of 1976 against Romesh and other defendants on 7.11.1975 praying for a declaration that she had 1/4th undivided interest in the suit land and contending that the defendants had no right to make any construction over the same. However, that suit was dismissed for default on 26.4.1976.

3.7 In the meantime, the plaintiff, who was at that time a minor, filed Civil Suit No.3941 of 1975 through her mother and guardian Sumitraben on 26.12.1975. She contended that the suit land was purchased by Ambalal Narottamdas and Gokaldas Narottamdas on 15.12.1930 with the aid of the income derived by them from the properties of their father and so it was an ancestral and joint family property. She, therefore, challenged the legality and validity of the permanent lease deed dated 3.1.1941 executed by Ambalal in favour of Gokaldas in respect of his one-half undivided share on the ground that the alienation made by Ambalal in favour of Gokaldas was without the consent of other coparceners and without any legal necessity for the alienation and hence it was not binding to his heirs. The plaintiff also pleaded that the will dated 29.6.1959 executed by her father Jayantilal in respect of the suit land was not legal and

binding to her as he had no right to make any will in respect of the same. She, therefore, prayed for a declaration that the permanent lease deed dated 3.1.1941 in respect of the suit land was null and void and for a declaration that the will dated 29.6.1959 was not legal and binding to her and for a further declaration that she has an undivided share in the suit land. She prayed for permanent injunction restraining the defendant No.1 from transferring any part of the suit land or from putting any construction on the same. She claimed that she had 1/40th undivided share in the suit land. She claimed the relief of partition and separate possession of her share. There was also a prayer for rendition of accounts by the defendant No.1.

3.8 In the said suit, defendant No.1 was Romeshchandra Ramniklal, the adopted son of Ramniklal and the grandson of Gokaldas who had inherited all the properties of Gokaldas under his will. The defendant No.3 was Ratilal Ambalal, who was the brother of Jayantilal and who was the natural father of Romeshchandra, the defendant No.1 and who had given his son in adoption. The other defendants Nos. 4 to 12 were the surviving members of the two families of Ambalal and Gokaldas. The contesting defendants were defendant No.1 and defendant No.3. They contended that the suit land was purchased by Ambalal and Gokaldas from their own income and it was a self-acquired property and by virtue of the permanent lease deed executed by Ambalal in favour of Gokaldas, the heirs of Ambalal were entitled to rent only and other rights of transfer were vested in defendant No.1 as an heir of Gokaldas Narottamdas. They also pleaded the bar of limitation. They contended that the plaintiff's suit was not maintainable. The defendant No.1 also claimed, in the alternative, that he had become owner of the suit land by adverse possession. Defendant No.3 Ratilal died during the pendency of the suit. After his death, one of his sons, Rohit who was impleaded as defendant No.3/B supported the plaintiff but the other two heirs stuck to the original stand of defendant No.3.

3.9 In Civil Suit No.1825 of 1979 the plaintiff contended that the adoption deed dated 11.1.1945 whereby Romeshchandra was adopted by Jayaben, widow of Ramniklal Gokaldas, was not legal and valid. She pleaded that the properties which had been acquired by Gokaldas were ancestral or joint family properties and she had an interest in them. She also claimed a decree for partition and accounts. Romeshchandra whose adoption was challenged, was impleaded as defendant No.1 to this suit. Defendants Nos. 2 and 3 were Ratilal Ambalal and his

wife Kamlaben, who had given their son Romeshchandra in adoption. The remaining defendants Nos. 4 to 14 were the other members of the families of Ambalal and Gokaldas. Defendants Nos. 1 to 3 contested the suit. They denied that the adoption was not legal and valid or that the suit properties were ancestral and joint family properties. They asserted that the suit properties were self-acquired properties and the plaintiff had no right, title or interest in them. They also pleaded the bar of limitation. Ratilal Ambalal, the defendant No.2 died during the pendency of the suit. Of his heirs who were brought on record, one son Rohit supported the plaintiff while the other two heirs adopted the defence pleaded by Ratilal.

4. The learned trial Judge raised the necessary issues arising from the pleadings of the parties. The parties led oral and documentary evidence in support of their respective cases.

5. The plaintiff examined three witnesses; (1) her mother Sumitraben, (2) Manchhaben, who was the mistress of Gokaldas, and (3) Anandrao, who was a neighbour of Ambalal and Gokaldas at Nadiad. Their evidence was to the effect that the suit land was acquired by Ambalal and Gokaldas with the income derived from the properties of their father. It was an ancestral and joint family property. The execution of permanent lease deed dated 3.1.1941 in favour of Gokaldas in respect of his one-half undivided share was not for any legal necessity. Sumitraben also stated that the will dated 29.6.1959 executed by her husband Jayantilal was not legal and binding as he had no right to make any will in respect of the ancestral property. According to her, the family of Narottamdas was joint and so was the family of Ambalal and Gokaldas and the suit properties at Items Nos.B and C were also joint family properties. All these properties had never been divided and they had a share in it. Manchhaben stated in her evidence that the two plots described at item 'B' of the suit properties were kept by Ambalal and Gokaldas and three buildings were constructed over them while Gokaldas kept one property at Bombay. According to Anandrao, one plot which was purchased by Gokaldas and described at item 'B' of the suit properties was purchased from the joint funds of Gokaldas and Ambalal and three buildings were constructed over it from the rental income realised from the tenants occupying the buildings on the suit land. Gokaldas purchased one plot of land at Mahim in Bombay from the Bombay Municipal Corporation in his name, but it was from the joint funds of both these brothers and Gokaldas got a building

constructed over it during the year 1939-40. He also stated that the business carried on in the name of Ramniklal Ratilal and sons was the family concern and it was commenced in the year 1930 and from the savings of that business, additional buildings were constructed at Maninagar and over the plot at Mahim.

6. As against this, the defendant No.1 Romeshchandra deposed that the suit land was purchased by Ambalal and Gokaldas from their own income and it was their self-acquired property and by virtue of the permanent lease deed dated 3.1.1941 executed by Ambalal in favour of Gokaldas, the heirs of Ambalal were entitled to rent only and other rights of transfer etc. were vested in him as an heir of Gokaldas. The suit properties described at items B and C were self-acquired properties of Gokaldas and they have been bequeathed to him under the will of Gokaldas.

7. The learned trial Judge found that the oral evidence of defendant No.1 was much more reliable than the evidence of the witnesses examined on behalf of the plaintiff as his evidence was amply corroborated by overwhelming documentary and circumstantial evidence while evidence of the plaintiff's witnesses was inconsistent with those documents and circumstances.

8. After considering all the evidence on record and the submissions made on behalf of the parties, the learned Judge recorded the following findings in Civil Suit No.3941 of 1975. The plaintiff had failed to prove that the suit land was purchased by Ambalal Narottamdas and Gokaldas Narottamdas with the aid of the income derived by them from the properties of their father and so it was an ancestral and joint family property. On the contrary, it was established that the suit land was purchased by them from their own income and it was their self-acquired property. In view of this finding, the issue as to whether the execution of the permanent lease-deed dated 3.1.1941 by Ambalal in favour of Gokaldas in respect of his on-half undivided share in the suit land was legal and binding to his heirs did not survive. By virtue of the said permanent lease deed, the heirs of Ambalal were entitled to rent only and other rights were vested in Romesh as an heir of Gokaldas Narottamdas. The plaintiff had also failed to prove that the will dated 29.6.1959 executed by her father Jayantilal Ambalal in respect of the suit land was not legal and binding to her. The learned Judge also held that the plaintiff's suit for declaration was barred by limitation.

9. In Civil Suit No.1825 of 1979, the learned Judge recorded the finding that the adoption was legal and valid. He also came to the conclusion that the suit properties were self-acquired properties and not ancestral and joint family properties or acquired from the income of such properties as alleged by the plaintiff. He held that the plaintiff's suit for declaration was barred by limitation. The plaintiff had no right, title or interest in the suit properties.

10. In view of the above findings, the learned trial Judge dismissed both the suits filed by the plaintiff.

11. The main questions which have been agitated in this appeal are whether the suit land and the suit properties were joint family properties as asserted by the plaintiff or were self-acquired properties as maintained by the defendant No.1; whether the permanent lease deed executed by Ambalal in favour of Gokaldas was legal and valid or not; whether the adoption was legal and valid or not; whether the suits were barred by limitation and whether the suits were maintainable or not.

12. The learned Advocates for the rival parties took me through what they considered to be relevant evidence in support of their respective cases. The learned Advocate for the appellant assailed the findings recorded against the appellant no.1, the original plaintiff while the learned Advocate for respondent No.1, the original defendant No.1, supported them.

13. Now, the following facts emerge from the evidence on record. Narottamdas Bhailalbhai Talati, who was the common ancestor of the parties, was a resident of Nadiad, District Kheda. He had three immoveable properties and some moveable properties at the time of his death on 12.10.1927. But before his death, he had made a will on 2.8.1919, copies of which are produced at Exhs.127 and 128. The will referred to the earlier will made by his father on 9.5.1912 and the fact that after his father's death, he and his brother Motilal had got the properties. Out of the three immoveable properties which he got, two were situated in the city of Nadiad, one was his residential house and the other a shop, the third property was an agricultural land situated at village Narsanda, Taluka Nadiad in which he had one half undivided share. Narottamdas by his will bequeathed the northern portion of the house of Ambalal and the southern portion to Gokaldas. The shop was given to Ambalal and



his one-half undivided share was bequeathed to Gokaldas. He also made some provision for his widowed daughter Jamnaben and gave her some moveable properties and ornaments and some arrangement was made for her clothing and the residuary was directed to be divided between Ambalal and Gokaldas. He also left certain debts which were divided between these two brothers, Ambalal and Gokaldas. As per the terms contained in the will of their father, they divided the properties and as per the endorsement dated 4.12.1940 made by Gokaldas below the will of his father, Ambalal disposed of the agricultural land at village Narsanda after obtaining the consent of Gokaldas and the amount realised was spent by Gokaldas in making additions and alterations in the house at Nadiad which belonged to him and so he had no claim in the land.

14. It is also not in dispute that Ambalal was serving in B.B. and C.I. Railway from 1911 till 1942 and in 1930 he was working as Signal Inspector at Ahmedabad. Then he was transferred to Bombay and his salary for the year 1934-35 was Rs.5016/-. His income for the year 1936-37, 1937-38 and 1938-39 was Rs.5313/-, 5798/- and 5999/- respectively as per income tax assessment orders. Gokaldas started his career by joining Government service in the Boring Department of Bharuch Municipality in 1922. He also commenced his business as Boring Contractors in the name of his son and Ambalal's son as M/s. Ramniklal Ratilal and Sons in that very year and during the period from 1925 to 1928 he opened an office at Reid Road in Ahmedabad where he established himself. The said firm had a flourishing business in various parts of Gujarat and the progress made by the said firm during the period from 1922 to 1949 was published in the form of a book-let which is at Exh.268. Gokaldas became a widower at the young age of 22 in 1916. He came in contact with one Manchhaben who was a Brahmin during his stay at Bharuch and since 1925 she had been residing with him as his mistress. Gokaldas shifted to Ahmedabad in 1928 or so where he was employed as a Store Keeper in Boring Works at Asarva in Ahmedabad. He resigned from that post in 1930 and thereafter he was exclusively attending to his aforesaid business.

15. Ambalal and Gokaldas jointly purchased an open piece of agricultural land admeasuring 4 acres and 4 gunthas situated in the sim of Khokhra-Mehmedabad, Talula and District Ahmedabad for Rs.8351/- by registered sale deed dated 15.12.1930. It was mutated in the joint names of both the brothers in the revenue record. In some portion of the suit land, certain houses and chawls were constructed between 1932 and 1940 and out of them one

block was given to Ambalal's daughter Vijayaben as a gift by registered gift deed dated 30.4.1936. It was executed by Ambalal and Gokaldas and attested by Ramniklal, Ratilal and Jayantilal.

16. Gokaldas in his own name purchased two plots of lands for Rs.1230/- and Rs.1910/- in Maninagar, Ahmedabad by registered sale deeds dated 1.2.1936 and 27.11.1935 and they were entered in his name in the revenue record. In 1936 Gokaldas constructed buildings over them. Gokaldas also purchased one piece of land in Bombay on instuments from Deputy Commissioner, Improvement, Bombay Municipality on 16.8.1938 for Rs.7,000/-.

17. It is an admitted fact that Ambalal and Gokaldas made a joint will in respect of their properties on 30.4.1936, but that is not on record. On 4.12.1940, these two brothers made their separate wills in respect of their properties which are at Annexures I and III respectively of the subsequent will of Gokaldas executed on 3.4.1958 which is produced at Exh.79. The contents of Annexure II of the said will reveal that Gokaldas and Ramniklal made a declaration before the Presidency Magistrate, Bombay on 8.2.1943 to the effect that from 1.11.1940 there had been a complete severance of joint family status between them, if not for the last several years as they had been living and earning separately and whatever they had earned and acquired was always kept as their separate property. This declaration was made to avoid any misunderstanding in the matter.

18. It is not in dispute that Ambalal and Gokaldas executed a registered lease deed on 3.1.1941 in respect of the suit land, the copies whereof are produced at Exhs.59 and 76. By the said deed, Ambalal gave on lease one-half undivided share in the suit land to Gokaldas for a period of 999 years on an yearly rent of 1611 commencing from 1.1.1941. Gokaldas was permitted to construct houses, bungalows, rooms, factories, etc. over the same. In case of acquisition of the suit land or part thereof, it was provided that half of the compensation amount of the land should be given to Ambalal and the compensation of the structure should be taken by Gokaldas and the rent should be proportionately reduced to the extent of the acquired portion. Gokaldas was also authorised to sell, mortgage, gift or in any other manner assign the leasehold right in the suit land on the terms and conditions mentioned therein. Gokaldas and Ramniklal also executed an agreement on 22.11.1942 whereby they bound themselves to pay to Ratilal 1/4th share of the profit which would not be less than about

Rs.1200/- a year till such time as Ratilal drew his capital of Rs.17,000/-. Similarly, the contents of declaration made by Ratilal 25.11.1942 before the Resident Magistrate, Nadiad reveal that he had no interest in the partnership done with Gokaldas registered on 31.1.1941 and he had no objection to allow Gokaldas to continue the business in the name of M/s. Ramniklal Ratilal & Sons and all accounts were settled by separate agreement dated 22.11.1942, according to which Gokaldas had to pay him an amount agreed upon. The contents of the receipt on reference of Exh.187 reveal that Ratilal was paid Rs.17,000/- by a draft dated 11.1.1943 by Gokaldas and Ratilal. Thereafter, as per the evidence of defendant No.1, Gokaldas constructed one building for dispensary, which was named 'Narottam Kutir' and three chawls over the suit land. He also constructed 8 houses over the same. Out of the said houses, one was dismantled and two were acquired on account of construction of a road and one was given to Vijayaben. There were 14 tenants in the remaining four houses. The Chawls too had been let out to 76 tenants and Gokaldas in his lifetime used to collect rent from the tenants.

19. After retirement, Ambalal was residing at Nadiad and he died on 8.1.1943.

20. Ramniklal, son of Gokaldas, who had married Jayaben, died at Bombay on 16.12.1944 at a very young age of 24 to 25 years. He had no issue at the time of his death. Within a month of the death of Ramniklal, Jayaben adopted Romeshchandra, the eldest son of Ratilal, as the son to her late husband on 11.1.1945 and the adoption deed was executed by Jayaben as well as by Ratilal and Kamlaben on their behalf and on behalf of Romeshchandra as his guardian. The deed was registered on the same day.

21. On 21.12.1945, Gokaldas made two separate trust deeds in respect of his properties which are described at items Nos.B and C of the suit properties.

22. Jayaben died on 5.10.1946 and Gokaldas also ceased to take active interest in the business.

23. Ratilal made a will on 20.8.1959, a copy of which is at Exh.227.

24. Jayantilal made a will in respect of his properties on 26.6.1959 and it was registered on 27-7-1959. He gave all his properties to his wife Sumitraben and after her death to his sons. In the will

he also recited the history of the suit land as to how it was acquired and leased out by Ambalal to Gokaldas. He bequeathed his right to recover the rent to Sumitraben. Jayantilal died on 5.3.1960.

25. Gokaldas executed his last will on 7.4.1958 which was registered on 8.4.1958. He bequeathed the suit properties to the defendant No.1 who had been adopted by his daughter in law and who was his grandson. He specifically made it clear that if the adoption of defendant No.1 was challenged in the court and unfortunately if it was set aside, he gave and bequeathed all the properties to defendant No.1 as gift and he was to enjoy them absolutely, even though the adoption was set aside. Gokaldas died on 14.10.1958 at Bombay.

26. After the death of Gokaldas, defendant No.1 took over the management of all the properties of Gokaldas, including the suit land.

27. It was only when defendant No.1 entered into negotiations with defendant No.2 for sale of part of the suit land and a public notice was published in a newspaper on 6.5.1975 that the present litigation started between the parties. The question is whether the suit land which was purchased by Ambalal and Gokaldas on 15.12.1930 for Rs.6351/- was acquired by them from their own funds or from the income derived by them from the properties of their father Narottamdas. The residential house at Nadiad did not fetch any income nor is there any evidence to show that the shop situated at Nadiad fetched any income. No doubt the one half undivided share in the land at village Narsanda was sold, but there is no satisfactory evidence on record to show as to in which year it was sold and for what amount. There is no documentary evidence on this point. The learned Judge has rightly observed that the oral evidence of the plaintiff's witnesses is highly unsatisfactory. The contents of the will of Gokaldas dated 4.12.1940 clearly reveal that the said land was disposed of by Ambalal after obtaining his consent and the amount realised was spent for making additions and alterations in the part of the house which belonged to Gokaldas at Nadiad. It means that it must have been sold subsequent to the year 1930 and not prior to it. Even if it is assumed that it was sold prior to 15.12.1930, the amount realised from sale would not be to the extent of Rs.6351/-. Contents of the will of Narottamdas clearly reveal that he gave ornaments to his daughter Jamnaben and in fact Narottamdas had left certain debts as per his will which he had divided between his two sons, out of which Gokaldas had already

paid the same and Ambalal had yet to pay. As stated earlier Ambalal was employed in a railway company and Gokaldas was also carrying on business. So they would certainly have their own income and they would be in a position to pay the purchase price of the suit land from their own income. So, the suit land purchased by them from their own income or funds would be their self-acquired property. There is no evidence that it was purchased by them with the aid of the income derived by them from the properties of their father. In fact, there was no nucleus at the time when the suit land was purchased by them. The learned Judge has rightly not accepted the oral evidence of the plaintiff's witnesses as the same is not consistent with the documentary evidence on record. The learned Judge has observed that the oral evidence of Sumitraben and Manchhaben does not inspire confidence and due weight must be attached to the assessment made by the learned trial Judge who had the opportunity to hear their evidence.

28. Even subsequent documents pertaining to the suit land go to show that the land was purchased by the two brothers from their own income and funds. The two plots of land of the suit properties described at items Nos.B and C were purchased by Gokaldas alone and he constructed buildings over them from his own income and funds. So, obviously these two properties were self-acquired properties. After referring to the gift deed dated 30.4.1936 made by the two brothers in favour of Ambalal's daughter Vijayaben and separate wills of Ambalal and Gokaldas dated 2.12.1940 coupled with the directions made therein regarding the rental income of the suit land and dispositions made in respect of the suit land and the lease deed made in respect of the suit land and the last will made by Gokaldas, the learned Judge came to the conclusion that the suit land was jointly acquired by the two brothers from their own income and I see no reason to take a different view. The sale deeds in respect of two plots of land of the suit property described at item No.B as well as the two wills of Gokaldas and two trust deeds made by him reveal that he was the exclusive owner of the suit property described at items Nos.B and C and he purchased the same and constructed buildings over them from his own income and funds. Even the wills of Jayantilal and Ratilal reveal that the suit land was acquired by Ambalal and Gokaldas from their own income and funds. These are all documents which were made long before the institution of the suit and the learned Judge has rightly said that there was no reason to disbelieve the contents of the said documents. In fact, they were all acted upon not only by Gokaldas and his son

Jayantilal and then by defendant No.1, but also by Jayantilal and Ratilal and after the death of Jayantilal by his widow Sumitraben and her elder son Hasmukhbhai. The learned trial Judge has also referred to the fact that the rent in respect of the suit land which was originally fixed at Rs.751/- was increased to Rs.1611/and its clarification was made not only in the will of Ambalal but also by the endorsements made by Ratilal below the will of Gokaldas and that the rent which was agreed to be paid to Jamnaben continued to be paid to her till her death in 1970. Even compensation for part of the suit land which was acquired by the Corporation under Town Planning Scheme was apportioned in accordance with the provision made in the lease deed. Even Jayantilal in his will made provision for receipt of the compensation amount as well as for rental income by Sumitraben in respect of the suit land. Sumitraben also received rental income in respect of the suit land from deft. No.1 after the copy of the will was sent to him with a request to make payment of rental income to her. Ratilal also made provision in his will for payment of rental income to his wife Kamlaben. All these documents leave no room for doubt that the lease deed was a genuine one. In fact it was accepted and acted upon by the branch of Ambalal and after his death by defendant No.1 and also by Jamnaben till her death in 1970. When it is shown that the suit land was purchased by Ambalal and Gokaldas from their own income and funds and it was their self-acquired property, then obviously Ambalal would have a right to execute such a lease deed in respect of his one half undivided share in it and that would be legal and binding to his heirs and the heirs of Ambalal would only have a right to receive the rent. Similarly, Jayantilal will have a right to make a will in respect of the rental income received by him because he got that right under the will of his father Ambalal and the daughters of Jayantilal, including the plaintiff were not given any right in respect of the rental income of the suit land. In fact all his daughters were completely disinherited from his property. His will has not been challenged in respect of his other properties. Half the portion of his residential house which he got was received from his father Ambalal under his will and claimed to be his self-acquired property. The remaining one half portion was purchased from Gokaldas, though originally both these portions belonged to Narottamdas. When that house is claimed to be the self-acquired property, it does not stand to reason that the right in respect of the suit land would not be his separate and self-acquired property. So the will made by Jayantilal in respect of the suit land was quite legal and valid and since he had

a right to make the will in respect of it, it would be binding on all his heirs including the plaintiff.

29. On behalf of the appellant, strong reliance is placed on certain correspondence pertaining to the suit land. Those letters were written by Gokaldas to Ambalal or to Jamnaben or to Jayantilal. The letters written to Ambalal dated 27.2.1942, 5.4.1942 and 25.7.1942 are at Exhs. 98, 99 and 100. The letters addressed to Jamnaben dated 13.12.1942 are at Exhs.112 and 113. Similarly, there were some letters written in 1949 which are at Exhs.102,103 and 104 and letters written in 1958 at Exhs.106 to 110. The learned Judge carefully considered the contents of all these letters and came to the conclusion that they do not help or advance the plaintiff's case and I agree with the same. The learned Judge has rightly observed that the letters suggest that the land was jointly acquired by the two brothers, but Ambalal's branch was dissatisfied in respect of the rental income fixed on account of execution of the lease deed for which alternative proposals were made by Gokaldas, but the same could not materialise till the death of Ambalal and so the arrangement made in respect of the suit land as per the terms and conditions of the lease deed was continued and the same were acted upon till the death of Gokaldas and thereafter by defendant No.1.

30. With respect to the two suit properties described at items B and C, the learned trial Judge has rightly rejected the plaintiff's version after carefully considering the evidence in paragraph 36 of the judgment. The plots were purchased by Gokaldas alone and they were mutated in his name and he made construction on the same from his own funds and they were always treated as his self-acquired properties.

31. It has been contended on behalf of the appellant that though Narottamdas had executed the will, Ambalal and Gokaldas had never intended to treat the families as separate families and that when the firm of Ramniklal Ratilal & Sons was started, both Ramniklal and Ratilal were minors and since Ambalal and Gokaldas were in service at that time, it means that it was Narottamdas who had started the business in the names of his grandsons. The appellant has also placed reliance on the contents of letter at Exh.110. It is also contended that the very fact that Ambalal and Gokaldas purchased the land jointly leads to conclusion that they had continued their status of a joint family. It has been submitted on

behalf of the appellant that the intention of the two brothers was not to separate from the family and hence they purchased the property jointly. It was argued on behalf of the appellant that the land bearing survey No.86/2 and 87/2 which was given to Ramniklal Gokaldas, vide entry No.124 Exh.89 reverted back to Gokaldas Narottamdas on the death of Ramniklal, vide entry dated 18.5.1945 Exh.84 and that this suggests that the principle of survivorship was made applicable and not the principle of inheritance and in 1945 there was a joint family and there was no question of sale of property. The appellant also relies on the fact that the gift-deed executed by Ambalal Gokaldas in favour of Ambalal's daughter Vijayaben was signed as witnesses by Ramniklal, the son of Gokaldas and Ratilal and Jayantilal, the sons of Ambalal. The appellant also relies on the letters, Exhs.98,99,102,103,104, 107, 112, 113, 114 and 117 as suggesting that Gokaldas regarded the property as ancestral property till 1958. An attempt has also been made to invoke the doctrine of blending and show that Gokaldas treated the properties as joint family properties though the plea of blending was not taken in the trial Court. The appellant has also contended that there is a strong presumption that Hindu brothers constitute a joint family and it is for the person alleging severance of the joint family to prove it. The appellant relied on the decision reported in Bharat Singh and others vs. Mist.Bhagirathi (AIR 1966 SC 405) in support of this contention.

32. However, what is to be seen and considered is the overall effect of the entire evidence on record. The appellant sought to reopen and unsettle transaction which had been completed more than 35 years ago. Gokaldas purchased lands in his own name in 1935 and 1936 and constructed buildings on them. He also created trusts treating the properties as his own. The lease-deed in question was executed in 1941. Ambalal died in 1943 but his son Jayantilal or his grandsons never took proceedings to challenge the lease-deed. Adoption was made in 1945. In his will, Jayantilal accepted the fact that his father had executed the lease deed and he bequeathed only the right to collect rent to his wife Sumitraben. Even after the death of Jayantilal in 1960, none of his four sons and four other daughters raised any dispute or filed a suit. It was only in 1975 when Romesh, the defendant No.1 who was the adopted son of Gokaldas and had succeeded to the properties of Gokaldas under his will entered into a transaction with respect to the suit land that Deviben, the youngest daughter of Jayantilal came forward to file the present suit. The



Court would be slow to unsettle transactions which had been completed decades ago unless the evidence is so compelling that no other conclusion is possible. In the present case, the learned trial Judge in his elaborate judgment discussed the entire evidence in detail and has come to the conclusion that there was no substance in the plaintiff's case that the properties were joint family properties. I agree with his conclusion and hold that the plaintiff has failed in her challenge.

33. The plaintiff challenged the validity of the permanent lease-deed executed by Ambalal in favour of Gokaldas on the ground that it was not legal and binding to his heirs as it was not for any legal necessity. This challenge is based on the contention that the property in question was joint family property. However, once it is held that the land was not joint family property in the hands of Ambalal, the challenge to the validity of the lease deed executed by him does not survive.

34. The learned Advocate also submitted that the lease-deed was not in favour of a stranger to the family and the so-called alienation being in favour of a family-member can be treated as a mere arrangement in the family rather than alienation creating rights of some third party. However, the appellant's specific plea and ground of challenge in the trial Court was that the lease-deed being an alienation without necessity was not legal and valid and not binding on the heirs. No plea of family-arrangement was taken and no such issue was framed in the trial Court and such a plea cannot be permitted to be raised for the first time in the appeal.

35. In Civil Suit No.1825 of 1979, the appellant-plaintiff challenged the legality and validity of the adoption of Romeshchandra, defendant No.1, by Jayaben, the widow of Ramniklal, who was the son of Gokaldas. The issue of adoption would appear to be academic because Gokaldas was careful to say in his will that Romeshchandra was to be his heir and get his properties even in case his adoption was challenged and set aside. Since, however, the plaintiff chose to file the suit challenging the adoption, the issue had to be decided.

36. Ramniklal died on 11.12.1944 at Bombay at the young age of 25 years and his wife Jayaben was 19 to 20 years old at that time. After the death of Ramniklal, she came to reside at Ahmedabad after about 20 days. On 11.1.1945, Jayaben adopted Romeshchandra as the son to her late husband Ratilal, who was the elder son of

Gokaldas. It appears from the evidence of the plaintiff's witnesses that they mainly challenge the adoption on two grounds; first, that Jayaben had no authority from her husband to adopt defendant No.1 and secondly she had not given free consent for his adoption. So far as the first ground is concerned, it is well-settled that in Bombay State a widow was entitled to adopt a son without authority from her husband subject to certain conditions. It is not necessary to refer to those conditions as none of them is satisfied in the present case. Hence there is no substance in the first ground of challenge.

37. As for the second ground of challenge, the broad facts which emerge from the evidence of Sumitraben, Manchhaben and Anandrao, who gave evidence on behalf of the plaintiff, and the evidence of defendant No.2/B Rohitbhai, the younger brother of Romesh who supported the plaintiff are that after the death of Romesh, Jayaben came to reside at Ahmedabad after about 20 days and all the family-members were in mourning. His obsequial ceremonies were performed by Jayantilal and it is alleged that on account of undue pressure of Gokaldas, Jayaben adopted defendant No.1 with a month after the death of her husband and at that time defendant No.1 was hardly aged 8 to 9 years and he was not even not in a position to speak properly. Even after his adoption, he continued to reside with his parents or his family members and he never resided with her and even after her death he continued to reside with his parents and other family members and his marriage was also performed by natural parents and marriage invitation cards were issued in the name of his father Ratilal. Hence according to the evidence of these witnesses, adoption was not legal and valid.

38. As against this, the evidence of defendant No.1 Romesh is to the effect that when he was adopted, ceremonies pertaining to adoption were performed in the bungalow situated in the suit land and his parents Ratilal and Kamlaben gave him to Jayaben who received him and then Hom and other ceremonies were performed. A photograph was taken and an enlarged copy of the photograph which was in the record of Gokaldas and which he received after his death is produced at Exh.312.

39. The photograph shows his parents sitting on his left side with his younger brother Rohitbhai sitting in between. In the centre, there is Yagnavedi and near it there are utensils for Puja. Near the Yagnavedi, Jayaben is sitting and the young boy sitting in her lap was

himself. One Keshavlal N.Sheth was sitting on a chair behind her and near him was Parsadbhai Shastri who performed the ceremonies. His elder sister Devilaben was also standing behind him and the young boy in her arms was his younger brother Mahendra. He also identified various other persons who appeared in the photograph. One of them was Ramniklal Jaychandra Dalal, who was an advocate and who had filed an affidavit in his support in the proceedings. Many of the elder persons, including the priest, who appeared in the photograph were dead. The adoption deed Exh.225 was executed by Jayaben and his natural parents and it was attested by Gokaldas, Chhotalal and Natvarlal Saraiya. It was registered on the same day.

40. According to Romeshchandra, after his adoption he went from Ahmedabad to Bombay along with Jayaben and Gokaldas and he joined Standard III in a school in January 1945 and he appeared in the annual examination in the month of May. But on account of his health, he returned to Ahmedabad in June and then he continued his school studies in Ahmedabad till he passed his SSC examination in 1954. He joined F.Y. Science at Vallabh Vidyanagar and thereafter he came back to Ahmedabad and joined St.Xavier's Science College where he studied for one year. He then left his studies and joined his natural father in the business which was being carried on in the name of Ramniklal Ratilal & Sons. He has also stated that after his adoption by Jayaben, the name of Ramniklal was being written as his father's name after his name. But when his marriage was performed in 1961, the marriage invitation cards were issued in the name of his father Ratilal because there was no elderly person alive from the side of Ramniklal. According to him, his relations with Manchhaben were not cordial since 1961 because he and other trustees had instituted a suit against her in 1962 as she had been acting against the directions of the trust. He also said that his relations with Rohitbhai had been strained since 1975 as Rohitbhai had demanded money from him for carrying on business, but he could not give any money to him since he had no funds available with him and Rohitbhai had filed two suits against him in 1979.

41. The learned Judge found that the oral evidence of defendant No.1 Romeshchandra was much more reliable than that of Sumitraben, Manchhaben, Anandrao and Rohitbhai as his evidence was corroborated by overwhelming circumstantial and documentary evidence. He, therefore, held that the plaintiff had failed to prove that the adoption-deed dated 11.10.1945 was not legal and valid.

42. The learned Advocate for the appellant contended that adoption-deed is said to have been executed on the same day as religious rites were allegedly performed, but it is impossible to believe that the rites could have been performed on the same day because if that were so it would have been clearly mentioned in the deed that they were going to perform a ceremony. He submitted that it was not possible to believe that in a Hindu family the ceremony of adoption will be performed within one month of the death of the young son when the family would be in mourning. He argued that the evidence clearly shows that no one from the paternal side of Jayaben was present and Ratilal and the wife of Ramniklal both were in mourning dress, i.e. black sari and white turban. He argued that the photograph had been taken for some other purpose, but an attempt has been made to pass it off as a photograph pertaining to the alleged adoption. He also submitted that Kamlaben, the natural mother of Romeshchandra had not been examined as a witness. Romeshchandra did not know any brothers and sisters of his adoptive mother. Even invitation cards on the occasion of his marriage were issued in the names of Ratilal and Kamlaben and not in the name of adoptee father. All these things, according to him, suggest that there was no adoption at all.

43. The learned trial Judge, however, carefully considered the evidence of the four witnesses who supported the plaintiff's case. He observed that except Anandrao, none of the other three witnesses had stated that any undue pressure was brought on Jayaben for adoption of defendant No.1. Admittedly, Anandrao, Sumitraben and Manchhaben were not present when adoption took place. Manchhaben, who had been living with Gokaldas as his mistress was not consulted about domestic affairs. Anandrao, who was not invited nor was present at the time of adoption, claimed that when he went to meet Jayaben at her residence about a month after adoption, he was told by her that Gokaldas had brought pressure on her and so she had adopted Romeshchandra and she broke down before him. The learned Judge has specifically observed that this piece of evidence of Anandrao does not inspire confidence and I agree with his reasons for making this observation. Jayaben never challenged the adoption during her lifetime. It was never challenged by any members of Jayantilal's family till 1979. The learned Judge, after referring to the evidence produced by Romesh to show that Manchhaben and Rohitbhai had been in litigation with him, found that they were highly interested witnesses and could not be

relied upon. Rohitbhai went so far as to deny that the boy found in between his parents in the photograph taken at the time of adoption was not himself. The learned Judge also found that Anandrao on account of his relations with the family members of Jayantilal had tried to oblige him by giving false evidence, presumably on account of misplaced sympathy. He referred to the fact that there were many documents produced on record to show that after adoption of Romoesh, his father's name was written as Ramniklal and not as Ratilal and he accepted Romesh's explanation for issuing marriage invitation cards in the name of Ratilal. Once the evidence of Romesh is accepted in preference to that of the witnesses on behalf of the plaintiff and Rohitbhai, it follows that all the requirements of a valid adoption had been satisfied and it was not proved that consent of Jayaben was obtained by undue influence, coercion or pressure. The learned trial Judge, therefore, rightly held that the plaintiff had not proved that the adoption was not legal and valid.

44. The next questions are whether the suits were maintainable and whether they were barred by limitation. The plaintiff claimed various reliefs of declaration, injunction, partition and possession and rendition of accounts. The learned trial Judge held that the reliefs for declaration of invalidity of the permanent lease deed dated 3.1.1941 and the invalidity of adoption deed were barred by limitation, but not other reliefs.

45. He also held that the plaintiff being a female was not a coparcener and was not entitled to challenge alienation.

46. The learned Advocate for the appellant submitted that in a suit for partition all the parties are plaintiffs and defendants and hence the suit filed by the appellant, who was a daughter of Jayantilal, was maintainable. According to him, when Jayantilal died in 1960 Hindu Succession Act was in force and under Section 6 of the said Act, a daughter was entitled to file a suit for partition. She was a minor when she filed the suit in 1975 and the suit filed by her was maintainable. He relied on the decisions of the Supreme Court in State of Maharashtra vs. Narayan Rao Deshmukh and others, AIR 1985 SC 716. He argued that the main relief in the suit was for partition and the reliefs for declaration of the invalidity of the lease deed and adoption were invalid were ancillary reliefs and hence the suits governed by Art.110 were within the period of limitation. He also submitted that there was no exclusion of the plaintiff or

any member belonging to the branch of Ambalal's family. He relied on the decisions of the Privy Council in Radhoba Baloba Vagh and others v. Aburao Bhagwantrao Shirole and others (AIR 1929 Privy Council 231); (Thakur) Nirman Singh and others v. Thakur Lal Rudra Partab Narain Singh and others (AIR 1926 Privy Council 100) and Nageshar Baksh Singh v. Mt. Ganesha (AIR 1920 Privy Council 46).

47. Now, though it is true that the suits are for claiming a share in the joint family property and for partition, it is obvious that the plaintiff cannot get any effective relief without challenging the lease deed. Hence what is necessary to consider is whether the suits for declaration of invalidity of the lease deed and the adoption were maintainable and whether they were barred.

48. Now, it is well settled that where an alienation is made by a coparcener in excess of his powers, it may be set aside at the instance of any other coparcener who was in existence at the time of completion of the alienation or at the instance of any coparcener who though not born was in his mother's womb at the time of alienation. The point is that a suit to challenge an alienation made by a coparcener in excess of his power can only be filed by another coparcener. In Hindu Law, there is a distinction between joint family and a Hindu coparcenery. A Hindu coparcenery is a much narrower body than the joint family. There may be female members in a joint Hindu family but no female can ever be a member of the Hindu coparcenery. The plaintiff was not a member of the coparcenery and hence it is obvious that she was not entitled to file the suit for setting aside the alienation by way of lease deed executed by her grandfather in favour of his brother. No male member of Ambalal's branch ever challenged the validity of the lease deed. It appears that during the pendency of the present appeals, Rohit Ratilal Talati, Hasmukh Jayantilal Talati and Sumitraben, mother of the original plaintiff Deviben, who were impleaded as defendants in the suits were transposed as appellants. However, that does not make the original suit filed by Deviben, who was a daughter of Jayantilal, maintainable.

49. Moreover, as pointed out above, no male member of Ambalal's branch ever filed a suit challenging the lease deed executed in 1941. If such a suit had been filed by any of them in 1975, it would have obviously been barred by limitation. None of the decisions cited on behalf of the appellant which have been referred to above, help her on this point. On the contrary, it was held by Privy

Council in Ranodip Singh & others v. Parmeshwar Pershad and others, AIR 1925 Privy Council 33 that under Section 6 of the Limitation Act, a benefit of extended period can only be claimed by a person entitled to institute the suit at the time from which the period of limitation is to be reckoned. But a minor, who was not in existence at the relevant time, is not entitled to such extension. The suit to set aside alienation filed by Deviben, who was not a coparcenery was clearly not maintainable and was barred by limitation. As for suit challenging adoption, I do not consider it necessary to go into the question of maintainability and limitation since the plaintiff has failed in her challenge on merits and Gokaldas made Romeshchandra his heir irrespective of adoption.

50. In view of the above discussion, the appellants fail in their challenge to the decree passed by the trial Court in both the suits. The appeals are, therefore, dismissed with no order as to costs.

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Mr.H.M. Parikh, learned Advocate for the appellants, prays that interim relief, which was granted during the pendency of the appeals, may be continued for some time so as to enable the appellants to prefer appeal against this judgment. Mr.S.H. Sanjanwala, learned Advocate for the respondent No.1, objects to interim relief being continued. In the circumstances of the case, status quo is ordered to continue till 20th March, 1999.

sd/

Dt.17.2.1999. (M.C.Patel,J.)

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